Quarterly Report

OF THE

ATTORNEY GENERAL

OF

ALABAMA

FOR THE PERIOD

FROM APRIL 1, 1970

THROUGH JUNE 30, 1970

VOLUME 139

MacDONALD GALLION, Attorney General

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QUARTERLY REPORT

of the

ATTORNEY GENERAL

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For the Period

From April 1, 1970

Through June 30, 1970

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1970 through June 30, 1970, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State, and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MacDONALD GALLION

Attorney General

MacDONALD GALLION

Attorney General

R. Hunter Phillips
Executive Assistant

John G. Bookout
Deputy Attorney General

Assistant Attorneys General

Charles H. Barnes
Richard Calhoun
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Tabor R. Novak, Jr.

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Finance:

James R. Solomon, Jr.

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George O. Miller

Mental Health:

Jamie L. Pettigrew
J. Jerry Wood

OPINIONS

April 2, 1970

Honorable A. W. Steineker, Jr., Chief Examiner

State Department of Examiners of Public Accounts

Capitol

Montgomery, Alabama 36104

Appropriations — Statutes — Constitutionality — Colleges and Universities.

1. The Northwest Alabama State Technical Institute may not legally pay Alabama Power Company for services from November, 1966, through January, 1970, from its appropriation for the fiscal year ending September 30, 1970, by virtue of the provisions of Section 213, as amended, Constitution 1901, and the Budget Act even though mistake or error was made in billing.

2. The services rendered by Alabama Power Company from October 1, 1969, through January, 1970, may be legally paid by the Northwest Alabama State Technical Institute from its appropriation for the fiscal year ending September 30, 1970.

Opinion by Assistant Attorney General Madison.

Dear Mr. Steineker:

Your request for an official opinion, dated March 26, 1970, is as follows:

"I am attaching a letter dated March 19, 1970, from Mr. Solon Gregg, Director of the Northwest Alabama State Technical Institute to Mr. E. A. Hester, one of our district supervisors; a copy of a letter to Mr. Solon Gregg, Director, Northwest Alabama State Technical Institute, dated March 17, 1970, from Mr. Sam H. Couch, District Manager of the Alabama Power Company; and a statement of the original billing and corrected billing from November 1966 through January 1970, submitted by the Alabama Power Company to the Northwest Alabama State Technical Institute.

"You will note from the attached correspondence that the Alabama Power Company claims an error in billing to the Northwest State School from November 1966 through January 1970, with a corrected balance due of $5,540.73. The school has insufficient non-appropriated funds with which to pay this amount and, if paid at all, it would have to be paid from appropriated funds. This department has expressed serious

doubts of the validity of paying prior year obligations from current year appropriations, though I see no objection to the school paying the corrected billing for the period beginning October 1, 1969 through January of 1970."

Section 213, Constitution of Alabama 1901, as amended by Amendment XXVI, proclaimed ratified August 2, 1933, requires that the State shall be run on a pay as you go basis. **Hall v. Blan,** 227 Ala. 64, 148 So. 601; **Norton v. Lusk,** 248 Ala. 110, 26 So. 2d 849.

A reasonable time only is allowed after the close of a fiscal year for the payment out of that year's appropriation of the lawful debts and obligations incurred during the fiscal year. **Baker v. Singleton,** 237 Ala. 394, 187 So. 478.

In an opinion of this office reported in Quarterly Report of Attorney General, Volume 21, page 201, it was ruled contrary to Section 213, as amended, Constitution 1901, to lease land needed by Alabama Boys Industrial School for longer than one year where future revenues were pledged to pay the rent. See also **Opinion of the Justices,** 251 Ala. 91 36 So. 2d 475.

In addition, the Budget Act of this State is for the purpose of making the State and its agencies operate within income. **Southern Industrial Institute v. Lee,** 234 Ala. 404, 175 So. 365.

The opinion of this office by letter dated May 7, 1962, to Mrs. Elizabeth Parks Beamguard, Director, Alabama Public Library Service, is directly in point with your present inquiry. The facts were that Georgia News Company submitted an invoice, dated October 13, 1961, for 1960 purchase order. This invoice was submitted after the company discovered an error on a previous invoice. The ruling of this office was as here quoted:

"As you are perhaps aware, the State of Alabama, as do most governmental agencies, operates upon a fiscal year basis, the fiscal period for the State of Alabama commencing October 1st and running through September 30th of the year following. Normally, appropriations are made for the operation of various state agencies for a given fiscal period and obligations incurred during any particular period should be satisfied from appropriations made for such period. In the instant case, it appears that an obligation properly chargeable to the 1960-61 fiscal period has now been presented for payment during the current fiscal year, that is 1961-62.

"In order to permit the satisfaction of obligations existing at the end of any given fiscal year the State Comptroller permits the encumbrance of monies in sufficient amounts to satisfy

obligations then outstanding for the fiscal period closing but which have not been satisfied. Had you known of the existence of this obligation, and had money been available for its payment, you might have encumbered sufficient money from the 1960-61 year to pay this obligation. However, if such was not done, I do not believe that you can now make such payment from the appropriation for the current fiscal period and, in this latter event, I would suggest that the vendor, the Georgia News Company, make appropriate claim before the State Board of Adjustment setting out the facts as to its claim. In this way, this obligation can be paid in no violation of fiscal procedure."

It is my opinion therefore that only that part of the obligation incurred for the period beginning October 1, 1969, through January, 1970, may be made from current appropriations for the fiscal year ending September 30, 1970.

Yours very truly,

MacDONALD GALLION
Attorney General

April 15, 1970

Honorable Ernest Stone
State Superintendent of Education
Department of Education
State Office Building
Montgomery, Alabama

State Department of Education — Schools — County Boards of Education — Agriculture and Industries.

Although there is no law which expressly prohibits the participation of food service management companies in the feeding program of public schools, it does not follow that school authorities are authorized to conduct such a program through the use of services of a food management company.

Opinion by Assistant Attorney General Miller.

Dear Sir:

Your request for an official opinion dated February 12, 1970, is as follows:

"We have had an inquiry from the U. S. Department of Agriculture, Southeast Regional Office, Atlanta, Georgia, with refer-

ence to Alabama's law or other legal basis which prohibits the participation of food service management companies in school and in institutional feeding programs.

"Please give us an official opinion at the earliest possible date as to the following:

"1. Is there a law or other legal basis which prohibits the participation of food service management companies in the public schools' feeding programs?

"2. Is there a law or other legal basis relating to the participation of food service management companies in nonprofit institutional programs?"

You ask whether there is a law or other legal basis which prohibits the participation of food service management companies in the public schools' feeding programs or any law relating to the participation of food service management companies in nonprofit institutional programs.

I do not find any statute which expressly prohibits the participation of food service management companies in the public schools' feeding program, nor do I find any statute which expressly relates to the operation of school cafeterias or lunchrooms for the feeding of students. Therefore, the answer to both of your questions are in the negative.

The school lunch program in the public school system is conducted by county and city boards of education through the agents and employees of such boards. It has previously been ruled by this office that authority for such activity is necessarily implied from existing statutes relating to the powers and authority of school boards for the administration, operation and management of the public school system. See Quarterly Report of Attorney General, Vol. 41, page 27; Quarterly Report of Attorney General, Vol. 50, page 104.

Although there are no provisions in the law which expressly prohibit the participation of food management companies in the public schools' feeding program, it does not necessarily follow that there is legal authority for school officials to conduct feeding program through the use of services provided by food management companies. There must be express authority for such activity or such authority must be necessarily implied from existing law. I recognize that there is a real and possibly a legal difference between such an operation being conducted by a school board through its agents, servants and employees and through a food management firm where the relationship of "independent contractor" might exist between the school board and the food management company. I will not attempt to answer this question at this time as you have not furnished any facts or details concerning a proposed operation of a school lunch room by a food management company.

Yours very truly,

MacDONALD GALLION
Attorney General

May 21, 1970

Honorable John F. Watkins
Executive Director
Alabama League of Municipalities
24 South Hull Street
Post Office Box 1270
Montgomery, Alabama 36102

Gasoline and Gasoline Tax — Gasoline Fund — Municipalities — Streets.

1. A municipality may not expend its share of the State Highway Gasoline Tax for the purpose of the routine cleaning of streets.

2. A municipality may expend its share of the State Highway Gasoline Tax for the purpose of removing obstructions from streets in order to provide for the free flow of traffic.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion dated April 17, 1970 is as follows:

"In behalf of our cities and towns in the State of Alabama I respectfully request your opinion on the following questions relating to the legality of expenditures of state gasoline tax funds shared with cities and towns of Alabama under the provisions of Act 217 of the Legislature of Alabama, 1969 Regular Session:

"(1.) May funds received by a municipality under the foregoing act be used to pay for labor and equipment necessary to sweep and clean municipal streets and rights-of-way?

"(2.) May funds received under the foregoing act be used by a municipality for the purpose of collecting and removing from municipal rights-of-way brush and cuttings that have been placed on such rights-of-way by citizens of the city, including labor and equipment necessary for this purpose?

"In view of the fact that our municipalities are concerned that they expend these funds within the legal requirements, your opinion in this instance will prove most helpful to the cities and towns of Alabama.
"Thanking you for this and your many past courtesies to us and our membership."

The State Highway Gasoline Tax is distributed under the provisions of Act No. 217, Acts of Alabama 1969, page 536. That portion of said statute which controls the use of the share distributed to a municipality reads as follows:

> "Wherever in this act any portion of the net tax proceeds is provided to be applied or used for highway purposes, the same shall be used as follows:
>
> * * * * * * *
>
> "(c) Where the use is by a municipality, such use shall be for transportation planning, the construction, reconstruction, maintenance, widening, alteration and improvement of public roads, bridges, streets and other public ways, including payment of the principal of and interest on any securities at any time issued by the municipality pursuant to law for the payment of which any part of the net tax proceeds were or may be lawfully pledged . . . ."

In the opinion reported in Quarterly Report of Attorney General, Volume 137, page 30, and in the opinions cited therein, we construed the above-quoted portion of said statute very broadly and held that the funds here considered may be used to defray the expense of, among other things, installing and maintaining stop signs, traffic signals and street lights. We also held that the salaries of certain municipal employees whose duties are connected with a municipal street department may be paid from the funds distributed under Act No. 217, supra.

However, we specifically stated in the opinion reported in Quarterly Report of Attorney General, Volume 137, page 30, supra, that the salaries of sanitation workers who are employed by a municipal street department may not be paid from such funds. See also **Orleans Parish School Board v. Murphy,** 156 La. 925, 101 So. 268. It is our opinion that the Legislature did not intend by the use of the language of Act No. 217, supra, quoted hereinabove, to authorize a municipality to use funds distributed under the provisions of said statute for sanitary or esthetic purposes.

Therefore, you are advised that the funds to which your request refers may not be used by a municipality to defray the cost of the routine sweeping and cleaning of streets. However, you are further advised that such funds may be used by a municipality to pay the expense of the labor and equipment necessary to remove objects from streets which interfere with the free flow of traffic thereon.

We trust that this opinion furnishes the desired information.

Very truly yours,

MacDONALD GALLION
Attorney General

May 26, 1970

Honorable O. J. Barton
Judge of Probate
Perry County
Marion, Alabama

Elections — Voters — Probate Judge.

1. Title 17, Section 185, Code of Alabama 1940, has application to all voters and not merely handicapped voters.

2. Assistance to illiterate and handicapped voters discussed.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of May 7, 1970, is as follows:

"Title 17, Section 185, Code of Alabama, 1940 (Recompiled 1958) reads, in part, as follows: ' . . . The Judge of Probate shall cause to be printed in large type cards of instructions for the guidance of electors in preparing their ballots . . .' Said section further reads, in part, as follows: ' . . . such cards shall be printed in clear large type and shall contain full instructions to electors as to what should be done; first, to obtain a ballot for voting; second, to prepare the ballot for deposit in the ballot box . . . .'

"Title 17, Section 176, Code of Alabama, 1940 (Recompiled 1958) outlines the procedure to be followed by the elector and election officers when the elector desires, because of certain specified handicaps, assistance in the casting of his ballot.

"Title 17, Section 359, Code of Alabama, 1940 (Recompiled 1958) provides a procedure to be followed in primary elections when the handicapped elector desires assistance in the casting of his ballot. A considerable variance is noted in these two sections.

"Since the approval of the Voting Rights Act of 1965 (USCA 1973) I am aware that there have been many changes in the voting procedures and conduct of elections in the State of Alabama. However, I am uncertain as to the applicable law (both State and Federal) pertaining to the right of a handicapped qualified elector of this County to obtain assistance in the casting of his ballot.

"In view of the duties imposed upon me by the provisions of Title 17, Section 185, Code of Alabama, 1940 (Recompiled 1958),

cited in paragraph one above, I would like an opinion from your office advising me as to:

"1. The exact instructions I should cause to be printed for the guidance of handicapped qualified electors with reference to their right to have assistance, in primary and general elections, in the marking and casting of their ballot;

"2. Who may lawfully assist a handicapped qualified elector in casting his ballot, and the manner in which such assistance may be lawfully given. For your information no voting machines are used at this time in Perry County.

"In view of the insuing Democratic Primary run-off election your prompt attention to my request for an opinion will be greatly appreciated."

Title 17, Section 185, Code of Alabama 1940, does not deal with instructions which should be printed for the guidance of handicapped electors with reference to obtaining assistance in voting in Primary and General Elections. On the contrary the instructions referred to therein are applicable to all voters. The language therein used is very broad and I cannot give you an exact answer as to what instructions will suffice under this section.

In view of the 1965 Voters Rights Act, I do suggest that you state in your instructions that handicapped and other persons are entitled to obtain assistance in voting.

This office in an opinion addressed to Hon. Phillip B. Wood, Jr., Sheriff of Autauga County, under date of July 16, 1968, found in Quarterly Report of Attorney General, Vol. 132, page 12, has answered your second question. The crux of the holding in this opinion is as follows:

"If an illiterate voter requires assistance in casting his ballot, there is no limitation under the law since the enactment of the Voting Rights Act of 1965 (42 U.S.C.A. 1973), that a person assisting the illiterate voter be confined to a particular precinct, beat, or box in the county. However, the assistance may be rendered only at the place where the voter casts his ballot."

I do wish to extend this opinion somewhat. If an elector, and especially an illiterate elector, requests assistance from some other person than an election official, I suggest that an election official be present to insure that the person making the illiterate's ballot marks it as the illiterate instructs.

Yours very truly,

MacDONALD GALLION
Attorney General

May 26, 1970

Honorable Marion H. Wilkins
Highway Director
Alabama Highway Department
Montgomery, Alabama 36104

Highway Department — Roads and Bridges — Contracts — Bids — Railroads.

Vendors supplying material to Alabama Highway Department on State purchase orders are entitled to be considered contractors with reference to adjustments for increases and decreases in common carrier rates under Article 9.08, Standard Specifications, Alabama Highway Department.

Opinion by Assistant Attorney General Brogden.

Dear Mr. Wilkins:

Your recent letter to me requests the opinion of this office and is in pertinent part as follows:

> "This office has been notified that effective April 1, 1970, there will be a freight increase on all liquid asphalt delivered by common carriers.
>
> "Article 9.08 of our Alabama Highway Department Standard Specifications allows for adjustments in payment to contractors for increases or decreases in cost due to change in common carrier rates on materials becoming a part of the completed work on construction projects.
>
> "It would be appreciated if you would give this office an opinion as to whether vendors supplying liquid asphalt and plant mix to the Department on state purchase orders would be considered as contractors as referred to in Article 9.08 of the Alabama Highway Department Standard Specifications. Attached is a copy of Article 9.08 of our Standard Specifications along with inquiries that are submitted to vendors to obtain bids supplying the liquid asphalt and plant mix to the Department."

It is assumed that the liquid asphalt and plant mix supplied by vendors to the Alabama Highway Department on the mentioned state purchase orders exceed five hundred dollars in value and, that the competitive bid law of Alabama would be applicable thereto. The Standard Specifications mentioned by you have been promulgated in accordance with law and are registered in the Alabama Highway Department and have the force and effect of law when not in conflict with applicable statutory law. Thus, the public and contractors doing

business with the State have a right to rely on the provisions of the Standard Specifications of the Alabama Highway Department.

In the inquiry to vendors to obtain bids, a copy of which was submitted with your letter, the following is noted:

> "Asphalt cements, cutbacks, emulsions, and tar products shall conform to the requirements of the Alabama Highway Department Specifications dated 1964, and any special provisions applicable to the material at the time of delivery."

From the wording of the above quote, conformity of the materials mentioned to the requirements of the Standard Specifications has obvious reference to content, strength, texture, grade, etcetra, of the particular material to be supplied, and such requirements are specifically set forth in the inquiry to vendors in order to specifically bind the successful vendor by a contractual relationship to such provisions of the Standard Specifications. The Alabama Highway Department is bound by its own specifications at the time of the adoption of such specifications and they become effective and binding on the Department as the public and contractors act and rely on the provisions thereunder.

Thus, it is found under Article 9.08 that the specifications allow for adjustments in payment to contractors for increases or decreases in cost due to change in common carrier rates on materials becoming a part of the completed work on construction projects. It is true that this Article of the specifications is found or located in that portion of the Standard Specifications dealing with the prime or general contractor. Yet, when vendors supply directly to the Alabama Highway Department on competitive bid, such vendors establish a contractual relationship with the Department and, as a matter of consistency, are entitled to rely on the Standard Specifications. To hold otherwise would be to permit a prime contractor to supply certain materials under his contract and get adjustments for increases or decreases in common carrier rates, and deny such adjustments to vendors who supplied the same materials under contract with the Department.

In my opinion, the vendors supplying liquid asphalt and plant mix to the Department on state purchase orders should be considered contractors within the provisions of Article 9.08 of the Alabama Highway Department Standard Specifications relative to adjustment of common carrier rates.

Very truly yours,

MacDONALD GALLION

Attorney General

June 3, 1970

Honorable C. C. Davis, Superintendent
Etowah County Schools
Gadsden, Alabama

Schools — County Boards of Education — Property.

1. Title to personal property in the form of a portable classroom, conveyed to "Glencoe Elementary School," vests in County Board of Education in trust for said elementary school though not purchased by school authorities.

2. The County Board of Education in the exercise of its reasonable judgment may pay balance due on the purchase price of said property if facts so warrant.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion of this office, dated May 14, 1970, is as follows:

"On November 24, 1969, an unincorporated organization, known as 'The Concerned Parents and Friends in Glencoe, Alabama,' supported by the Etowah County Association for Exceptional Children, purchased from a local dealer a 12 foot by 48 foot portable or mobile classroom for the purpose of providing classroom facilities for teaching of these children.

"This group had the bill of sale made to 'Glencoe Elementary School,' which is a school under the jurisdiction and control of the Etowah County Board of Education and the group of citizens paid something over 1/2 of the purchase price of $4,536.00.

"At the request of this group of citizens, the Etowah County Board of Education would like to pay the balance due on this portable classroom, which is still in the possession of the Glencoe school, if such payment would not be contrary to law.
"Your opinion is, therefore, requested on the following:

"(1) Inasmuch as the bill of sale was made to Glencoe Elementary School, a school under the control and jurisdiction of the Etowah County Board of Education, which has possession of said portable classroom, would payment of a portion of the purchase price be a legal expenditure of funds of the Etowah County Board of Education.

"(2) In view of the fact that this purchase was made by a private group of citizens who have paid more than 1/2 of said

purchase price, would payment of the balance of the purchase price which is substantially over $500.00, by the Etowah County Board of Education violate any provisions of the competitive bid laws of this state."

It was ruled by this office in Quarterly Report of Attorney General, Volume 39, page 20, that title to real and personal property conveyed to school trustees for school purposes vests in the county board of education. This ruling was followed in opinion dated August 4, 1964, to Honorable W. Loy Campbell, Attorney, Jackson County Board of Education. See also Biennial Report of Attorney General, 1928-30, page 121.

Under Section 71, Title 52, Code of Alabama 1940, Recompiled 1958, and the above opinions, the Bill of Sale to "Glencoe Elementary School" vested title in the County Board of Education in trust for the said elementary school. **White v. State,** 42 Ala. App. 249, 160 So. 2d 496.

In order to clear its property for the uses intended, it is my opinion that the County Board of Education may legally do so by paying the balance due thereon. But whether it should do so or not rests in the exercise of reasonable judgment on the Board's part. What condition is the property in at this time? Is it still needed for the purposes for which it was conveyed, etc.? These and other similar matters relating thereto are for the Board's determination in the light of facts within its knowledge.

The above renders it unnecessary to answer your second question.

Yours very truly,

MacDONALD GALLION
Attorney General

June 12, 1970

Honorable J. Dennis Herndon
Judge of Probate, Greene County
Eutaw, Alabama 35462

Officers and Offices — Counties — Probate Courts — Salaries — Courts of County Commissioners — Attorney General — Statutes — Legislature.

1. The Attorney General is not authorized by law to pass upon the constitutionality of Acts of the Legislature.

2. An Act of the Legislature may be followed by public officials until there is a declaration of its invalidity by a court of competent jurisdiction.

3. A Probate Judge may employ clerical assistants as deemed necessary for the efficient performance of the duties of his office, and may fix the amount of their compensation, payable from the general funds of the county, not to exceed the amount per annum specified in an Act of the Legislature.

4. A County governing body may not act arbitrarily in approving appointments by a Probate Judge of clerical assistants or in fixing their salaries.

5. If a County governing body acts arbitrarily in any manner, the ultimate resolution of such questions rests with courts of competent jurisdiction and not with the Attorney General.

Opinion by Assistant Attorney General Hall.

Dear Judge Herndon:

Your request for an official opinion bearing date of May 13, 1970, is as follows:

> "At the regular monthly meeting of the Greene County Commissioners Court I as Probate Judge proposed to hire an additional clerical worker for the Probate Office. The Probate Judge of course has the right to hire people for his office but under Act No. 948, Regular Session 1969, (copy enclosed) an allowance was set up applying to Greene County for clerk hire for the Probate Office not to exceed $12,000.00 per annum. I had proposed to pay this clerk $300.00 per month that being the salary of the last clerical employee hired by the County. This amount would not cause the total for the year to exceed the maximum of $12,000.00. However, this Act No. 948 further states that 'the exact amount thereof shall be subject to the approval of the County Governing Body.'
>
> "Would you please review this act and advise me whether the Probate Judge has the right to hire a clerk and is entitled to have the salary set at a reasonable figure or does the governing body have the right to defeat the purpose of this Act by refusing to set a salary?
>
> "If a clerk is hired by the Probate Judge under this act and a reasonable figure set for salary within the $12,000.00 limit, is this salary a legal claim against the County?"

Basically, your request is that the Attorney General interpret the constitutionality of Act No. 948, Regular Session 1969, Pages 1681-1682.

As you probably are aware, the Attorney General has no legal authority to rule on the constitutionality of Acts of the Legislature, although the written opinion of the Attorney General protects certain specified public officers, boards, local governing bodies, or agencies,

and the members thereof from liability to either the State, County, or other municipal subdivisions of the State. Title 55, Section 241, Code of Alabama 1940 (Recompiled 1958), as amended.

The ultimate decision as to the constitutionality of an Act of the Legislature is a matter which addresses itself to the consideration of a court of competent jurisdiction.

There is some question, to my way of thinking, as to the constitutionality of Act No. 948, supra, because of its application to a limited population spread; that is, it can only apply to one county, obviously Greene County. See **Couch v. Rodgers,** 253 Ala. 533, 45 So. 2d 699, and authorities there cited.

However, this Act may still be followed until there is a declaration of its invalidity by a court of competent jurisdiction. See Title 41, Section 58, Code of Alabama 1940 (Recompiled 1958).

With these thoughts in mind, it appears that you may employ such clerical assistants as you may deem necessary for the efficient performance of the duties of your office, and that you may fix the amount of their compensation, payable from the general funds of the county, not to exceed $12,000.00 per annum.

In my opinion, if the approval of each salary, is required by the County governing body, such County governing body may not act in an arbitrary manner in not approving your appointment of employees or in fixing their salaries within the limit prescribed by the Act.

If the County governing body does so arbitrarily act, then this is a matter for a Court of competent jurisdiction to decide.

Very truly Yours,

MacDONALD GALLION
Attorney General

June 16, 1970

Honorable J. Paul Meeks
Judge of Probate
Jefferson County Courthouse
Birmingham, Alabama 35202

Filing Tax — Deed Tax — Joint Venture.

1. An unincorporated joint venture falling within the purview of the provisions of Act No. 1071, Alabama Legislature, 1969 Regular Session, may hold title to real estate in its own name and such property is deemed to be "partnership"

property separate and apart from real estate held in the name of one of the "partners" or joint venturers.

2. A statutory warranty deed from one of the joint venturers conveying real estate to the joint venture is subject to deed tax under Title 51, Section 618, Code of Alabama 1940, Recompiled 1958.

Opinion by Assistant Attorney General Loeb.

Dear Judge Meeks:

Your request for an opinion dated November 10, 1969, states as follows:

"We are enclosing herewith a copy of a statutory warranty deed from Southern Natural Realty Corporation to Fifth Avenue Realty Company, an unincorporated joint venture formed under an agreement by and between the First National Bank of Birmingham and Southern Natural Realty Corporation. And also enclosed is a letter from Canabiss, Johnston, Gardner & Clark, attorneys.

"The joint venture is formed pursuant to Act 1071 of the 1969 Regular Session of the Alabama Legislature.

"For the purpose of determining the amount of deed tax to be collected under Title 51, Section 618, Code of Alabama, will you please give your opinion of the following questions:

"Is the filing of this statutory warranty deed subject to the payment of deed tax under the provisions of Section 618 of Title 51, Code of Alabama?

"Is any exemption or credit due on such tax by reason of the fact that one member of the joint venture is a national banking corporation, which, itself, is exempt from the deed tax?

The language used in the sections quoted above obviously contemplates that real estate may be conveyed to the partnership or joint venture in the name of such partnership or joint venture, may be held by such partnership or joint venture in its own name and, when so held, shall be deemed to be the property of the partnership or joint venture. This is true despite the fact that such property may be disposed of by conveyance in the partnership name by one or more of the partners. It is therefore my opinion that the partnership or joint venture must be considered as an entity separate and apart from the partners or joint venturers who compose same.

Under the facts presented in your letter and attachments thereto, it appears that the real estate here in question is being conveyed by Southern Natural Realty Company, one of the joint venturers, to Fifth

Avenue Realty Company, the joint venture which is composed of Southern Natural Realty Company and First National Bank of Birmingham. As pointed out in your subsequent letter of April 23, 1970, pursuant to the rule promulgated by the Commissioner of Revenue, as of February 13, 1970, national banking associations are no longer exempt from deed tax levied under Section 618, as amended, Title 51, Code of Alabama, Recompiled 1958. Therefore, the fact that one of the joint venturers, First National Bank of Birmingham, is such a national banking association is no longer a relevant factor, and its former immunity as a federal instrumentality need not now be considered. Under the provisions of Section 7, Act No. 1071, supra, property belonging to a partner or joint venturer, when conveyed by such partner to the partnership in its name becomes "partnership" property. It seems clear, therefore, that such property when so conveyed is completely commingled, loses its identity as property of any one of the partners, and takes on an entirely separate identity as "partnership" property.

Without deciding just how much of the opinion contained in Quarterly Report of the Attorney General, Vol. 95, page 9, has been overruled by the opinion contained in Quarterly Report of the Attorney General, Vol. 104, page 34, it is sufficient to say that neither opinion is controlling as to the fact situation here presented. Without holding whether the nature of the interest changes when a husband holding title to real estate conveys same to himself and wife with right of survivorship, it can be stated this is not necessarily the same situation as that presented when a partner conveys property to a partnership of which he is a member. We conclude that the nature of the interest does change under the facts as here presented.

The statutory warranty deed here in question does convey title to or interest in real estate from one of the joint venturers to the joint venture within the contemplation of Section 618, supra, and is therefore subject to deed tax.

Yours very truly,

MacDONALD GALLION
Attorney General

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